IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
(Before Hood, P.J., Holbrook Jr., J.J., and Owens, J.J.)

TAXPAYERS OF MICHIGAN AGAINST CASINOS, and LAURA BAIRD,

Plaintiff-Appellants,

v.

the STATE OF MICHIGAN,

Defendant-Appellee,

And

NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC., IV, and GAMING ENTERTAINMENT, LLC,

Intervening Defendants-Appellees.

Supreme Court No. 122830

Court of Appeals No. 225017

Ingham County Cir. Ct. No. 99-90195-CZ

BRIEF ON APPEAL — *AMICI CURIAE* CITY OF NEW BUFFALO AND NEW BUFFALO TOWNSHIP

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TABLE OF CONTENTS

TABLE OF CONTENTS i

INDEX OF AUTHORITIES ii

INTERESTS OF AMICI 1

STATEMENT OF JURISDICTION 2

QUESTIONS PRESENTED 2

COUNTER-STATEMENT OF FACTS 2

ARGUMENT 3

I. The Compact Provision Allowing Local Governments to Receive a Share of the Revenues from Class III Gaming Upon Establishing Local Revenue Boards is Not "Lawmaking" that Must be "Enacted" by a Bill of the Legislature. 4

II. The Local Acts Provision of the Michigan Constitution does not Apply to the Compacts because They are Not Legislative Enactments, and, Even If They Were, they Would Not Constitute Local Acts Falling within that Provision 6

CONCLUSION 10

INDEX OF AUTHORITIES

Cases

Attorney General ex rel Dingeman v. Lacy, 180 Mich 329; 146 NW 871 (1914) 9

Attorney General ex rel Eaves v State Bridge Commission, 277 Mich 373; 269 NW 388 (1936) 9

California v Cabazon Band of Mission Indians, 480 US 202 (1987) 8

Fitzsimmons & Galvin, Inc v Rogers, 243 Mich 649; 220 NW 881 (1928) 9

Schnack v Applied Arts Corp, 283 Mich 434; 278 NW 117 (1938) 4

Sheldon Company Profit Sharing Plan & Trust v Smith, 858 F Supp 663 (WD Mich 1994) 4

TOMAC v. Norton, 240 F Supp2d 45 (DDC 2003) 1

Statutes

25 U.S.C. §§ 1300k-1300k-7 6

25 USC § 2701(5) 7

25 USC §§ 2703(4) 7

25 U.S.C. § 2710(d) 7

MCL 123.871 5

MCL 124.505(c) 5

MCL 432.201-432.216 7

MCL 600.1405(1) 5

MSA 5.3421 5

MSA 4.4088(5c) 5

MSA 27A.1405(1) 5

Constitution

Const 1963, art 4, § 22 ..... 3, 5

Const 1963, art 4, § 29 ..... 3, 8, 9

Miscellaneous

Tribal-State Compacts, Michigan Gaming Control Board (http://www.michigan.gov/mgcb) 3, 7

Stephen L. Pevar, *The Rights of Indian Tribes* (Southern Illinois Press 2002) 8

INTERESTS OF AMICI

Amici curiae, New Buffalo Township and the City of New Buffalo (collectively the "New Buffalo Local Governments") are the local governments in the vicinity of lands owned by the Pokagon Band of Potawatomi Indians (the "Pokagon Band"), where it proposes to engage in "Class III" (or casino-style) gaming pursuant to the Indian Gaming Regulatory Act, 25 USC §§ 2710 *et seq*. ("IGRA"). The New Buffalo Local Governments fully support the commencement of gaming operations by the Pokagon Band. They have direct interests in this case because ongoing delays in the commencement of gaming by the Tribe mean concomitant losses of opportunities for economic development and other benefits for the communities they serve.

The City of New Buffalo and New Buffalo Township suffer from economic stagnation, increasing unemployment rates, and declining populations.[1] Their ability to provide basic governmental services to their communities has been hampered by the resultant undermining of the tax base, and they cannot rely on State revenue-sharing. The New Buffalo Local Governments look forward to the promise of much improved economic conditions from Class III gaming by the Pokagon Band. Studies commissioned by the New Buffalo Local Governments and Berrien County as well as the Bureau of Indian Affairs project that this gaming development will generate over 5,000 new jobs. *See, e.g., TOMAC v Norton*, 240 F Supp2d 45, 51 (DDC 2003)

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[1] The communities' difficult economic times are reflected in the New Buffalo Area School District, where enrollment declined more than 30 percent between 1990 and 1998.

(citing BIA projection of "the creation of 5,600 permanent jobs at the casino and in the community"). This employment, in turn, is projected to induce $60 million in new local spending. *See id.* (citing BIA projection of $215 million in spending at the casino, $60 million in spending at local retail stores, restaurants, hotels, and vendors, and $300 million in trickle-down spending through the rest of the local economy). Beyond this, revenue sharing arrangements from the gaming are projected to generate over $40 million for the New Buffalo Local Governments in the first five years of operation.

STATEMENT OF JURISDICTION

The New Buffalo Local Governments agree with, and incorporate by reference herein, the Statement of Jurisdiction set forth in the *Brief on Appeal – State of Michigan as Appellee.*

QUESTIONS PRESENTED

The New Buffalo Local Governments agree with, and incorporate by reference herein, the Statement of Questions Presented as set forth in the *Brief on Appeal – State of Michigan as Appellee* as well as the State's answers to those questions.

COUNTER-STATEMENT OF FACTS

The New Buffalo Local Governments agree with, and incorporate by reference herein, the Counter-Statement of Facts set forth in the *Brief on Appeal – State of Michigan as Appellee.*

ARGUMENT

The Plaintiff, Taxpayers of Michigan Against Casinos ("TOMAC") seeks a declaratory judgment against the State of Michigan to strike down the State's approval of four IGRA Compacts, including that of the Pokagon Band.[2] It makes two arguments of particular relevance to the New Buffalo Local Governments. First, in asserting that the Compacts are "legislation" which, under the Michigan Constitution, must be enacted by bill, TOMAC points to Section 18 of the Compacts, which allows Local Governments to share in the revenue stream from Class III gaming upon establishing "Local Revenue Sharing Boards." TOMAC claims that the State's approval of such a provision must be deemed "lawmaking" by the legislature, and, therefore, subject to "enactment" by bill pursuant to Article 4, Section 22 of the Michigan Constitution. *See Brief on Appeal – Appellant* ("TOMAC Brief") at 28-29. Second, under an assumption that the Compacts are legislative enactments, TOMAC asserts that because they designate the locations for the Tribes' Class III gaming within the Tribes' Congressionally-defined territories, the Compacts must be deemed "Local Acts," which can only be "enacted" by a two-thirds majority of the Michigan legislature pursuant to Article IV, Section 29 of the Michigan Constitution. *See*

[2] The other three IGRA Compacts are with the Little River Band of Ottawa Indians (the "Little River Band"), the Little Traverse Bay Bands of Odawa Indians (the "Little Traverse Bay Bands"), and the Nottawaseppi Huron Band of Potawatomi (the "Nottawaseppi Huron Band"). The four affected tribes are collectively referred to herein as the "Tribes." Information on tribal gaming in Michigan, including full copies of the four IGRA Compacts at issue in this case, is available at the Michigan state government's website: http://www.michigan.gov/mgcb.

TOMAC Brief at 45-49. The Court of Appeals unanimously rejected these arguments, and this Court should as well.

I. The Compact Provision Allowing Local Governments to Receive a Share of the Revenues from Class III Gaming Upon Establishing Local Revenue Boards is Not "Lawmaking" that Must be "Enacted" by a Bill of the Legislature.

Section 18 of the Compacts, entitled "Tribal Payments to Local Governments," provides for the Tribes to pay "the aggregate amount of two percent (2%) of the net win at each casino derived from Class III electronic games of chance" to local governments where the gaming operations are to take place. *See* App. at 66a.[3] The State's intent, under this section, is to allow local governments in the vicinity of the Tribes' gaming facilities to obtain financial resources to help with operating costs that may be associated with the development. *See id.* To this end, Section 18 calls for the creation of a Local Revenue Sharing Board "to receive and disburse . . . semi-annual payments from the Tribe." *Id.* at 66a-67a.

Pointing to this provision, TOMAC asserts that the State "has *created* a new unit of local government." TOMAC Brief at 29 (emphasis added). It has not.

As TOMAC concedes throughout its brief, the IGRA Compacts at issue are contracts. Importantly, the local governments are not parties to these contracts and, therefore, are not bound by them. *See Schnack v Applied Arts Corp*, 283 Mich 434, 440; 278 NW 117 (1938); *Sheldon Company Profit Sharing Plan & Trust v Smith*, 858 F Supp 663, 670 (WD Mich 1994). Thus, if they refused to establish Local

[3] The citations to "App." herein refer to the Appellant's Appendix.

Revenue Sharing Boards, the Compacts would provide no legal basis to force them to do so.

Stated another way, Section 18 provides contingent benefits to local governments as third party beneficiaries to the contracts.[4] The contingency is that in order to receive the benefits, they must create the local boards to receive them. Local governments have a choice about whether to fulfill that condition or not.[5] If they do, they can share a portion of the Class III gaming revenues. If they do not, then they cannot. But their failure to create Local Revenue Sharing Boards to receive the contemplated benefits would not constitute a "breach" of the Compacts.

In sum, contrary to TOMAC's argument, Section 18 of the Compacts does not "create" new units of local government. Rather, it makes local governments nothing more than third party beneficiaries to the Compacts if they fulfill the condition precedent by establishing Local Revenue Sharing Boards. They are under no obligation to fulfill that condition. Section 18 does not, therefore, transform the Compacts into "legislation" that must be "enacted" by bill pursuant to Article 4, Section 22 of the Michigan Constitution.

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[4] A person is the beneficiary of a promise if the promissor undertakes "to give or to do or refrain from doing something directly to or for said person." MCL 600.1405(1); MSA 27A.1405(1). Michigan law recognizes the very type of contingent benefits at issue in the Compacts. By statute, local governments are expressly authorized to accept grants "subject to the conditions, limitations, and requirements provided in the grant, devise, bequest, or other instrument." MCL 123.871; MSA 5.3421.

[5] Local governments are fully empowered to create Local Revenue Sharing Boards as they may see fit. *See* MCL 124.505(c); MSA 5.4088(5c) (local units of government may create legal or administrative entities by interlocal agreements "with powers designated to that entity").

II. The Local Acts Provision of the Michigan Constitution does not Apply to the Compacts because They are Not Legislative Enactments, and, Even If They Were, they Would Not Constitute Local Acts Falling within that Provision.

TOMAC's argument that the Compacts violate the Local Acts provision of the Michigan Constitution, turns, in the first instance, on whether they constitute "legislation" that must be enacted by a bill of the legislature. For all of the reasons set forth in the Brief of the State of Michigan, as well as those set forth in Section I, above, the Compacts are not "legislation." The New Buffalo Local Governments fully endorse the arguments set forth by the State of Michigan in this regard.

In any event, even assuming TOMAC could establish that the Compacts constitute "legislation," it cannot prevail on its argument that they are "Local Acts," subject to Article IV, Section 29 of the Michigan Constitution. The Local Acts Provision states:

> The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. No local or special act shall take effect until approved by two-thirds of the members elected to and serving in each house and by a majority of the electors voting thereon in the district affected. Any act repealing local or special acts shall require only a majority of the members elected to and serving in each house and shall not require submission to the electors of such district.

Const 1963, art 4, § 29 (the "Local Acts Provision"). Seeking to require "enactment" of the Compacts by a super-majority (two-thirds) of the legislature, TOMAC characterizes the Compacts as "local acts" under this provision. As the Court of Appeals correctly ruled, TOMAC is mistaken.

The Compacts limit the development of Class III gaming to "eligible Indian lands," which are defined in accordance with the lands that the federal government designated as eligible to be held in trust by the United States on behalf of the Tribes in their respective Restoration Acts.[6] IGRA confirms the authority of Indian tribes, as separate sovereigns under federal law, to raise tribal governmental revenue through gaming within their territories.[7] Since, *a fortiori*, the governmental authority of Indian tribes is essentially confined to tribal reservations and trust lands, Congress made clear, under IGRA, that tribes' gaming operations would be contained in such lands. *See* 25 USC §§ 2703(4) (defining "Indian lands"); 2710(d) (discussing gaming on "Indian lands").[8] State laws directed at local matters within a State's jurisdiction,

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[6] For instance, pursuant to the Restoration Act of the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians, 25 USC §§ 1300k-1300k-7, Congress provided: "The Secretary shall acquire real property in Emmet and Charlevoix Counties for the benefit of the Little Traverse Bay Bands" and "in Manistee and Mason Counties for the benefit of the Little River Band." 25 USC § 1300k-4. The Little River Band's Compact simply provides that Class III gaming will occur on that Tribe's Indian reservation or trust lands in these areas. *See* App. at 51a. The "eligible Indian lands" for Class III gaming in the Compacts for the Pokagon Band, the Little Traverse Bay Bands, and the Nottawaseppi Huron Band likewise track the federal government's recognition of their aboriginal lands to be restored as Indian lands within their respective jurisdictions: lands within Emmet and Charlevoix Counties for the Little Traverse Bay Bands (*see* 25 USC § 1300k-4); within Allegan, Van Buren, and Cass Counties for the Pokagon Band (*see id.* § 1300j-5); and within Calhoun County for the Nottawaseppi Huron Band (*see* 60 Fed Reg 66315, Dec 21, 2003). The Compacts for the Little Traverse Bay Bands, the Pokagon Band, and the Nottawaseppi Huron Band are accessible at www.michigan.gov/mgcb.

[7] This is discussed in the *Brief on Appeal for* Amici Curiae *Little River Band of Ottawa Indians, Little Traverse Bay Bands of Odawa Indians, Nottawaseppi Huron Band of Potawatomi, and Pokagon Band of Potawatomi Indians.*

[8] As a matter of federal law, Indian tribes exercise governmental authority over their reservations (established by treaty, statute, or aboriginal possession) and land held in trust

however, cannot infringe upon the federally protected right of tribes to pursue economic development and generate governmental revenue through gaming. For tribes have *exclusive* jurisdiction over gaming if the State in which they are located permits the type of gaming at issue by any person for any purpose. *See California v. Cabazon Band of Mission Indians*, 480 US 202, 216-222 (1987); 25 USC § 2701(5). Michigan, of course, permits casino-style gambling. *See* MCL 432.201-432.216.

Understanding this, the Court of Appeals rejected out of hand TOMAC's assertion that the Compacts' geographic designation of gaming *on Indian lands* could be deemed a "local act" subject to Const 1963, art 4, § 29:

> [W]hile cities surrounding the designated casino areas may be affected, the IGRA has provided that Indian tribes may operate casinos on tribal lands. The citizens of the State of Michigan cannot vote on the propriety of placing tribal casinos on tribal lands. Thus, this argument is without merit.

App. at 135a. This is the correct assessment of TOMAC's claim. Federal law preempts the application of the Local Acts Provision. The provision cannot be applied to affect the location of Indian gaming on Indian lands, a location protected and confirmed by federal law.

In any event, even if the provision could be applied to the Compacts' geographic designation of Indian lands for gaming under federal law, that designation would not run afoul of the provision. The purpose of the Local Acts Provision is to prevent the legislature from engaging in "direct and unwarranted interference in

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on their behalf by the United States. *See generally* Stephen L. Pevar, *The Rights of Indian Tribes* (Southern Illinois Press 2002) 96-97.

purely local affairs" without "grave attention" from the legislators. *Attorney General ex rel Dingeman v. Lacy*, 180 Mich 329, 337-38; 146 NW 871 (1914) (emphasis added).

Quite apart from the fact that the gaming activity at issue is on Indian lands subject to the exclusive jurisdiction of the Tribes, the fact and consequences of the Indian gaming at issue are not "purely local." They certainly have local effects, but not every legislative action which has an impact on a particular geographic area is a "local act" within the scope of § 29. This Court recognizes that legislative acts aimed at statewide concerns are not "local acts."

For example, this Court concluded in *Attorney General ex rel Eaves v. State Bridge Commission*, 277 Mich 373; 269 NW 388 (1936), that a statute providing for, *inter alia*, the acquisition and operation of an international bridge and ferries across the Saint Clair river in the Port Huron area was not a "local act." *Id.* at 378. Notwithstanding the significant impact of the bridge upon Port Huron, this Court observed that the bridge was related to obvious non-local, statewide concerns. *Id.* at 379. *See also Fitzsimmons & Galvin, Inc v Rogers*, 243 Mich 649, 666-67; 220 NW 881 (1928) (statute providing for local land acquisition to improve state highway not a "local act").

The same is true with respect to the location of Class III gaming operations within Indian lands. Pursuant to *national law*, the Tribes may proceed with gaming within their reservation and trust lands in Michigan. Indian gaming is, therefore, much more than a purely local concern for the local communities affected by the

gaming developments. Like the bridge in *Eaves*, Indian gaming under IGRA has an effect on local communities, but it is not a purely local matter falling within the Local Acts Provision of the constitution.

In sum, upon approving the Tribes' IGRA Compacts, the legislature did not arbitrarily impose casino gaming on any particular area. The location of Indian lands is beyond the control of the State. Further, the legislature is not interfering with any locality's right to control affairs that are purely local in nature. The federal regulation of Indian gaming and the resultant Compacts address an area of nationwide, not purely local, concern.

CONCLUSION

For the reasons set forth in the brief of the State of Michigan and those set forth above, the Michigan legislature properly approved the IGRA Compacts by means of a resolution. They are not legislative enactments; nor are they Local Acts under the Michigan constitution. The decision of the Court of Appeals should be affirmed.

Respectfully submitted this 22 day of December, 2003,

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